(2)

No. 08-1428

In the Supreme Court of the United States

JOHN BURKEY, PETITIONER

v.

HELEN J. MARBERRY, WARDEN

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ELENA KAGAN
Solicitor General
Counsel of Record
LANNY A. BREUER
Assistant Attorney General
KIRBY A. HELLER
Attorney
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether petitioner's habeas petition, which sought early release from his term of imprisonment under 18 U.S.C. 3621(e)(2)(B), is moot because petitioner was released from imprisonment and did not demonstrate that habeas relief would likely cause the district court that sentenced him to exercise its sentencing discretion under 18 U.S.C. 3583(e) to reduce petitioner's unexpired term of supervised release.

TABLE OF CONTENTS

Page

Opinion below 1
Jurisdiction 1
Statement 1
Argument 7
Conclusion 19

TABLE OF AUTHORITIES

Cases:

Arizonans for Official English v. *Arizona*, 520 U.S. 43 (1997) 8
ASARCO Inc. v. *Kadish*, 490 U.S. 605 (1989) 13
Church of Scientology v. *United States*, 506 U.S. 9 (1992) 7
Dawson v. *Scott*, 50 F.3d 884 (11th Cir. 1995) 17, 18
Gonzales v. *Thomas*, 547 U.S. 183 (2006) 13
Gunderson v. *Hood*, 268 F.3d 1149 (9th Cir. 2001) 16
INS v. *Ventura*, 537 U.S. 12 (2002) 12
Johnson v. *Pettiford*, 442 F.3d 917 (5th Cir. 2006) 18
Lane v. *Williams*, 455 U.S. 624 (1982) 8, 9
Levine v. *Apker*, 455 F.3d 71 (2d Cir. 2006) 7, 15, 16
Lewis v. *Continental Bank Corp.*, 494 U.S. 472 (1990) 8
Lopez v. *Davis*, 531 U.S. 230 (2001) 2, 3, 12
Lujan v. *Defenders of Wildlife*, 504 U.S. 555 (1992) 13
Mills v. *Green*, 159 U.S. 651 (1895) 7
Mitchell v. *Middlebrooks*, 287 Fed. Appx. 772 (11th Cir. 2008) 18

Cases—Continued: Page

Mujahid v. *Daniels*, 413 F.3d 991 (9th Cir. 2005), cert. denied, 547 U.S. 1149 (2006) 7, 16
SEC v. *Chenery Corp.*, 318 U.S. 80 (1943) 13
Sibron v. *New York*, 392 U.S. 40 (1968) 8
Spencer v. *Kemna*, 523 U.S. 1 (1998) ..... *passim*
United States v. *Blackburn*, 461 F.3d 259 (2d Cir. 2006), cert. denied, 550 U.S. 969 (2007) 14, 16
United States v. *Hardy*, 545 F.3d 280 (4th Cir. 2008) 17
United States v. *Johnson*, 529 U.S. 53 (2000) 11, 12
United States v. *McCoy*, 313 F.3d 561 (D.C. Cir. 2002) 14
United States v. *Mercurris*, 192 F.3d 290 (2d Cir. 1999) 17
United States v. *Vera-Flores*, 496 F.3d 1177 (10th Cir. 2007) 17
Wisniewski v. *United States*, 353 U.S. 901 (1957) 18

Constitution, statutes and regulation:

U.S. Const. Art. III 6, 7, 8, 13, 15, 19
Administrative Procedure Act, 5 U.S.C. 553 4
18 U.S.C. 3553(a) 14
18 U.S.C. 3583 11
18 U.S.C. 3583(c) 14
18 U.S.C. 3583(e) 5, 6, 13, 19
18 U.S.C. 3583(e)(1) 10
18 U.S.C. 3621(e) 2
18 U.S.C. 3621(e)(2)(B) 2, 3, 4, 5, 12
18 U.S.C. 3624(b) 16

Statute and regulations—Continued: Page

28 U.S.C. 2241 ..... 1, 4
28 C.F.R.:
Section 550.55(b)(7) (2009) 15
Section 550.58 ..... 2, 3
Section 550.58(a) 3
Section 550.58(b) 3
Section 550.58(c) 3

Miscellaneous:

Federal Bureau of Prisons, U.S. Dep't of Justice:
Program Statement No. 5331.01, Early Release Procedures Under 18 U.S.C. § 3621(e) (Sept. 29, 2003, as corrected Oct. 3, 2003) 4, 5, 9, 12
Program Statement No. 5331.02, Early Release Procedures Under 18 U.S.C. § 3621(e) (corrected Feb. 20, 2009) <http://www.bop.gov/policy/progstat/5331_002.pdf> 4
64 Fed. Reg. (2004):
p. 39,889 15
p. 39,892 15
74 Fed. Reg. (2009):
pp. 1892-1899 3
pp. 1894-1895 15
p. 1899 15

In the Supreme Court of the United States

No. 08-1428

JOHN BURKEY, PETITIONER

v.

HELEN J. MARBERRY, WARDEN

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-17a) is reported at 556 F.3d 142.

JURISDICTION

The judgment of the court of appeals was entered on February 18, 2009. The petition for a writ of certiorari was filed on May 15, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner filed a habeas petition under 28 U.S.C. 2241 challenging the decision of the Federal Bureau of Prisons (Bureau or BOP) to deny petitioner's request for an early release from imprisonment based on petitioner's completion of a substance-abuse-treatment pro-

gram. The district court denied the petition as moot. The court of appeals affirmed. Pet. App. 1a-17a.

1. a. In July 1992, a district court sentenced petitioner to 63 months of imprisonment, to be followed by four years of supervised release, for possession of marijuana with the intent to distribute it. In November 1994, petitioner was sentenced in a second federal case to a concurrent term of 62 months of imprisonment for conspiring to distribute and to possess with intent to distribute a controlled substance and conspiring to launder monetary instruments. While serving his sentences, petitioner completed the institutional and community-based components of the Bureau's Residential Drug Abuse Program (RDAP) and became eligible for early release under 18 U.S.C. 3621(e)(2)(B). Pet. App. 1a-2a; Gov't C.A. Br. 6-7.

Section 3621(e)(2)(B) provides that, if a federal prisoner convicted of a nonviolent offense successfully completes a program of residential substance-abuse treatment, the period that the prisoner will remain in custody "may be reduced by the Bureau of Prisons" by "not more than one year from the term the prisoner must otherwise serve." 18 U.S.C. 3621(e)(2)(B). Section 3621 vests the Bureau with "discretion to reduce the term of imprisonment" for eligible program participants and neither identifies any "circumstance[s] in which the Bureau * * * must grant [a sentence] reduction" nor specifies any circumstances in which the Bureau "is forbidden" from exercising such authority. *Lopez* v. *Davis*, 531 U.S. 230, 241-242 (2001). "[T]he Bureau thus has the authority, but not the duty, * * * to reduce [a] term of imprisonment" under Section 3621(e)(2)(B). *Id.* at 241.

To implement Section 3621(e)'s early-release incentive, the Bureau promulgated 28 C.F.R. 550.58. See

Lopez, 531 U.S. at 233. Section 550.58 specified that, "[a]s an exercise of the discretion vested in the [Bureau]," the Bureau would decline to grant early release to certain categories of inmates, and would "consider[] for early release" inmates deemed otherwise "[e]ligible" for a favorable exercise of discretion. 28 C.F.R. 550.58(a) and (b). That regulation did not specify that the Bureau must exercise its discretion to grant certain inmates early release, nor did it limit the considerations that the Bureau would consider in exercising its discretion. Instead, Section 550.58 simply provided that "an inmate * * * may receive a [sentence] reduction of up to 12 months" if the inmate "is approved for early release" by the Bureau. 28 C.F.R. 550.58(c).[1]

In June 1998, the Bureau granted petitioner an early release from imprisonment pursuant to Section 3621(e)(2)(B). See Gov't C.A. Br. 7.

b. While on supervised release, petitioner committed new drug crimes and was convicted in the United States District Court for the Northern District of Ohio of conspiring to possess at least 100 kilograms of marijuana, with the intent to distribute it. In July 2003, the district court sentenced petitioner to 57 months of imprisonment, to be followed by three years of supervised release. That court also sentenced petitioner to a concurrent term of three months of imprisonment for violating his supervised release in the earlier cases. Petitioner's statutory release date was September 16, 2007. Pet. App. 2a, 5a; Gov't C.A. Br. 7.

The Bureau again approved petitioner for participation in its RDAP, but, in 2005, advised petitioner that,

---

[1] Section 550.58 was amended in 1997 and was not revised again until January 2009. See 74 Fed. Reg. 1892-1899 (2009).

based on BOP Program Statement 5331.01, the Bureau would not exercise its authority to grant petitioner early release from imprisonment. See Gov't C.A. Br. 7-8. Paragraph 5(c) of Program Statement 5331.01 provided that "[i]nmates returning on supervised release violations and/or inmates who are sentenced for new offenses are not eligible for early release if they received it previously." Pet. App. 3a & n.2 (quoting BOP Program Statement 5331.01, at para. 5 (Sept. 29, 2003, as corrected, Oct. 3, 2003)).[2]

In December 2005, petitioner began the institutional component of the Residential Drug Abuse Program. In March 2006, the BOP denied petitioner's administrative appeal requesting an early release under 18 U.S.C. 3621(e)(2)(B). See Pet. App. 4a.

2. In June 2006, petitioner filed a habeas petition under 28 U.S.C. 2241 in the United States District Court for the Western District of Pennsylvania, challenging the Bureau's denial of early release on the ground that, as relevant here, Program Statement 5331.01 was invalid because it was promulgated without notice and comment purportedly required by the Administrative Procedure Act (APA), 5 U.S.C. 553. As relief, petitioner sought an order directing "the Bureau of Prisons to grant [petitioner] a § 3621(e) sentence reduction." Pet. Mot. for Relief Pursuant to 28 U.S.C. 2241, at 9; see Pet. App. 4a; Gov't C.A. Br. 8.

In October 2006, while petitioner's habeas case was pending, petitioner completed the institutional component of RDAP. In March 2007, petitioner began the

---

[2] Program Statement 5331.01 was rescinded and replaced by Program Statement 5331.02 effective March 16, 2009. See BOP Program Statement 5331.02 (corrected Feb. 20, 2009), available at <http://www.bop.gov/policy/progstat/5331_002.pdf>.

transitional, community-based component of RDAP upon his transfer to a halfway house. If the Bureau determines that an inmate who is eligible for early release has successfully completed the entire Residential Drug Abuse Program, the inmate may be released early from imprisonment purusant to 18 U.S.C. 3621(e)(2)(B).

On August 31, 2007, a magistrate judge recommended that the district court grant petitioner's habeas petition and order his immediate release. Pet. App. 27a-49a. The magistrate judge concluded that Paragraph 5(c) of the Program Statement was invalid because it was a legislative rule that the Bureau promulgated without public notice and comment required by the APA. *Id.* at 4a-5a.

On September 7, 2007, the Bureau released petitioner from custody and subsequently filed a "Notice of Suggestion of Mootness." The district court agreed that petitioner's release from custody rendered his habeas petition moot. Pet. App. 18a-26a. The court acknowledged that petitioner's sentencing court in Ohio had discretionary authority to reduce or eliminate petitioner's remaining term of supervised release under 18 U.S.C. 3583(e), but it rejected as speculative petitioner's contention that the Ohio court would do so if the district court resolved petitioner's habeas petition. Pet. App. 5a-6a & n.3, 20a-22a.

3. The court of appeals affirmed. Pet. App. 1a-17a. Relying on *Spencer* v. *Kemna*, 523 U.S. 1 (1998), the court stated that, once a prisoner has completed his term of imprisonment, a case challenging the administration of his completed prison term will become moot unless he continues to suffer an "actual injury traceable to the defendant" that is "likely to be redressed by a favorable judicial decision." Pet. App. 9a (quoting

Spencer, 523 U.S. at 7). The court explained that petitioner "did not challenge the validity or reasonableness of" his three-year term of supervised release and, instead, challenged "only what the BOP had done" with respect to petitioner's request for early release from imprisonment, which, in petitioner's view, resulted in a "continuing injury" by "delay[ing] commencement of [petitioner's] validly imposed term of supervised release." *Id.* at 10a-11a. The court of appeals held that such an injury did not support Article III jurisdiction because a favorable judicial decision would not "likely" redress the claimed injury. *Id.* at 11a-13a.

The court of appeals concluded that "[t]he 'likely' outcome here" is that an order from a Pennsylvania district court in this habeas case will not "cause the sentencing court in Ohio to reduce [petitioner's] term of supervised release." Pet. App. 12a. The court of appeals explained that a sentencing court, when making the "discretionary decision" under Section 3583(e) to modify a term of supervised release, "must consider many factors, * * * including those that bear directly on the objectives of supervised release." *Ibid.* "From a practical, and legal, standpoint," the court found, it is unlikely that "a sentencing judge, having imposed a specific term of imprisonment and supervised release, would alter his view as to the propriety of that sentence because the BOP required the defendant to serve it." *Ibid.*

The court further explained that the decision to reduce a term of supervised release under Section 3583(e) "generally is more directly influenced by the particular defendant and the underlying conduct that formed the basis for the term of supervised release" and that a favorable exercise of sentencing discretion was

improbable here, "especially given [petitioner's] past recidivism." Pet. App. 12a-13a. Thus, petitioner's habeas claim was moot because the possibility of a discretionary reduction in petitioner's supervised release term to serve as "equalizer for his [purportedly over-length] incarceration" was "so speculative" as to render a habeas ruling advisory. *Id.* at 13a.

The court interpreted *Levine* v. *Apker*, 455 F.3d 71 (2d Cir. 2006), and *Mujahid* v. *Daniels*, 413 F.3d 991 (9th Cir. 2005), cert. denied, 547 U.S. 1149 (2006), as finding Article III jurisdiction "where a 'possibility' exists that a court would reduce a term of supervised release in situations similar to this," but it found such reasoning to be "[un]supportable" because a showing of a "'possibility' of redress" is insufficient to satisfy *Spencer*'s requirement that an ongoing injury will "'likely' be redressed" by granting habeas relief. Pet. App. 14a, 16a.

ARGUMENT

Petitioner contends (Pet. 5-25) that the court of appeals erred in dismissing his habeas petition as moot and that its decision conflicts with decisions of other courts of appeals. The court of appeals correctly dismissed petitioner's case, and its fact-bound decision does not warrant this Court's review.

1. "It has long been settled that a federal court has no authority 'to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it.'" *Church of Scientology* v. *United States*, 506 U.S. 9, 12 (1992) (quoting *Mills* v. *Green*, 159 U.S. 651, 653 (1895)). Thus, "[t]o qualify as a case fit for federal-court adjudication, an actual controversy must be extant

at all stages of review." *Arizonans for Official English* v. *Arizona*, 520 U.S. 43, 67 (1997) (internal quotation marks and citation omitted). "[T]hroughout the litigation, the plaintiff 'must have suffered, or be threatened with, an actual injury traceable to the defendant and likely to be redressed by a favorable judicial decision.'" *Spencer* v. *Kemna*, 523 U.S. 1, 7 (1998) (quoting *Lewis* v. *Continental Bank Corp.*, 494 U.S. 472, 477 (1990)).

The completion of a criminal defendant's sentence will not normally moot an appeal challenging his conviction because criminal convictions generally have "continuing collateral consequences" beyond just their sentences. *Spencer*, 523 U.S. at 8, 12; see *Sibron* v. *New York*, 392 U.S. 40, 57-58 (1968). When a criminal conviction is not itself challenged, however, the Article III analysis is different. See *Spencer*, 523 U.S. at 7-8.

The Court in *Spencer* "refused to extend [the] presumption of collateral consequences" beyond criminal convictions, 523 U.S. at 12, and held that Spencer's habeas challenge to an order revoking his parole could not be sustained as a live Article III controversy based on the resulting term of imprisonment that injured Spencer because, once Spencer had served the prison time, that term of imprisonment could not "be undone," *id.* at 8; cf. *Lane* v. *Williams*, 455 U.S. 624, 631 (1982) ("Since respondents elected only to attack their sentences, and since those sentences expired during the course of these proceedings, this case is moot."). The Court explained that a habeas plaintiff challenging such action after completing his prison term must therefore "demonstrate[]" that the action continues to cause "collateral consequences adequate to meet Article III's injury-in-fact requirement." *Spencer*, 523 U.S. at 14; see *id.* at 12 (citing *Williams*, *supra*). The habeas plaintiff must not

only show that such ongoing consequences are "traceable to the defendant['s]" challenged action, he must demonstrate that they are "likely to be redressed by a favorable judicial decision." *Id.* at 7 (citation omitted). Petitioner has failed to do so.

a. When the Bureau released petitioner from serving his term of imprisonment, petitioner effectively obtained all the relief that he had sought in his habeas petition, *i.e.*, an order directing "the Bureau of Prisons to grant [petitioner] a § 3621(e) sentence reduction." Pet. Mot. for Relief Pursuant to 28 U.S.C. 2241, at 9. The district court could not have granted petitioner any more effectual relief on his habeas petition than the Bureau's own release order because a subsequent court order could not have resulted in any earlier release from imprisonment. Cf. *Williams*, 455 U.S. at 633 (holding that respondents' claims that they were not informed that they faced mandatory parole terms before pleading guilty were moot because their claims sought only immediate release from custody and "[t]hrough the mere passage of time, respondents have obtained all the relief that they sought.").

b. To the extent that petitioner effectively sought a declaratory judgment that the Bureau erred in a past decision to deny petitioner an early release based on Paragraph 5(c) of BOP Program Statement 5331.01 (which petitioner asserts was improperly promulgated without APA notice-and-comment rulemaking), the court of appeals correctly determined that petitioner's requested relief was not "likely" to redress his claimed injury. Petitioner concedes that the court of appeals articulated the "correct[]" test under *Spencer* in "requir[ing] that [petitioner's] asserted injury be 'likely to be redressed by a favorable judicial decision'" and, thus,

petitioner simply contends the court of appeals "misapplied that test" here. Pet. 22 (quoting *Spencer*, 523 U.S. at 7). The court of appeals, however, correctly rejected petitioner's assertion that it was not merely "possib[le]" but "probab[le]" (Pet. 23) that habeas relief by a Pennsylvania district court would cause petitioner's Ohio sentencing court to exercise its discretion to reduce petitioner's unexpired term of supervised release.

As the court of appeals explained, such sentencing relief is "speculative" and not "likely." Pet. App. 12a-13a. Petitioner would have to file a Section 3583(e) motion in the Northern District of Ohio seeking to terminate his term of supervised release and satisfy that court "that such action is warranted by [his] conduct * * * and the interest of justice," 18 U.S.C. 3583(e)(1). See Pet. App. 5a n.3, 12a. Petitioner has not filed such a motion. And, while petitioner contends (Pet. 19-20) that resolving his habeas petition will allow him to argue in such a motion that such a reduction is warranted because he was "unlawfully over-incarcerated," the court of appeals correctly recognized that the sentencing court's decision is purely "discretionary" (Pet. App. 12a) and that the Bureau's failure to publish its rule would be "simply one factor, among many," *Spencer*, 523 U.S. at 14 (citation omitted), that the sentencing court must consider, and hardly a persuasive one at that. Pet. App. 12a-13a (discussing "many factors" that influence the "discretionary decision"). Petitioner is a repeat offender who, after completing BOP's drug-abuse program in his first incarceration, violated the terms of his supervised release by committing a serious drug offense and again required additional residential drug-abuse assistance while in custody. That background and the sentencing court's own requirement that petitioner "participate in

an outpatient program * * * for the treatment for drug and/or alcohol abuse" during his period of supervised release (*id.* at 59a-60a) make clear that court of appeals correctly concluded that the sentencing court would not "likely" terminate petitioner's supervised release term.

The court of appeals correctly determined that it would be unlikely that the sentencing court would reduce petitioner's supervised-release term even if petitioner were "over-incarcerated" (Pet. 20) because incarceration and supervised release are not "interchangeab[le]" so as to warrant a reduction here to "offset [any] excess prison time." Pet. App. 12a-13a (discussing *United States* v. *Johnson*, 529 U.S. 53 (2000)). "Supervised release fulfills rehabilitative ends, distinct from those served by incarceration," and is "intended * * * to assist individuals in their transition to community life." *Johnson*, 529 U.S. at 59. Petitioner's recidivism and substance-abuse history shows that he is in particular need of such assistance. In other words, "[t]he objectives of supervised release would be *unfulfilled* if excess prison time were to offset and reduce terms of supervised release." *Ibid.* (emphasis added). The sentencing court would likely recognize that reality.

And, while *Johnson* observed that a sentencing court may modify or terminate an individual's supervised release conditions under Section 3583 "as it sees fit" in light of the equitable considerations that exist "when an individual is incarcerated beyond the proper expiration of his prison term," 529 U.S. at 60, that observation is "nothing more or less than an appropriate reference to the discretion of a sentencing court to modify a term of supervised release pursuant to § 3583(e)." Pet. App. 16a. Unlike *Johnson*, where the "equitable consider-

ations" were of "great weight" because Johnson was incarcerated for a conviction that was subsequently vacated, 529 U.S. at 60, petitioner served a *lawfully* imposed sentence of imprisonment, and it is exceedingly "doubt[ful]" that the very judge that imposed that sentence "would alter his view as to the propriety of th[e] sentence because the BOP required [petitioner] to serve it." Pet. App. 12a.

Petitioner's fundamental assumption that a habeas court could have directed the Bureau to grant petitioner an early release under Section 3621(e)(2)(B), is itself incorrect. That provision vests the Bureau, not the courts, with "discretion to reduce [a] term of imprisonment" for eligible inmates, and it imposes no restriction on that discretion by specifying any "circumstance[s] in which the Bureau * * * must grant [a] reduction." *Lopez* v. *Davis*, 531 U.S. 230, 241-242 (2001). Congress thus gave the Bureau "the authority, but not the duty, * * * to reduce [a] term of imprisonment" by an amount of time (no more than one year) of the Bureau's choosing. *Id.* at 241; see *id.* at 239-240 ("agree[ing]" with the Bureau that "Congress simply 'did not address how the Bureau should exercise its discretion'").

Even if Paragraph 5(c) of Program Statement 5331.01 were procedurally invalid, that conclusion would not by itself entitle petitioner to an early release from his valid prison sentence in this habeas proceeding. The very most that a habeas court properly could do is order the Bureau to reconsider its early-release decision without considering Paragraph 5(c). Cf. *INS* v. *Ventura*, 537 U.S. 12, 16 (2002) (holding that courts sitting in judicial review of agency action must normally remand a case to an agency after finding agency error because, when the "law entrusts the agency to make [a] decision," a "judi-

cial judgment cannot be made to do service for an administrative judgment") (quoting *SEC* v. *Chenery Corp.*, 318 U.S. 80, 88 (1943); *Gonzales* v. *Thomas*, 547 U.S. 183, 186 (2006) (same).

In short, judicial habeas relief in this case would be highly unlikely to cause his Ohio sentencing court to reduce petitioner's term of supervised release. Not only is that judicial decision a discretionary one under Section 3583(e) for which the relevant facts of this case tilt heavily against a reduction, petitioner's claim to early release from imprisonment itself depends on the Bureau's administration of its early-release authority and drug-treatment program, not on a decision of the habeas court. Where the redressability of a claimed Article III injury "depends on the unfettered choices made by independent actors not before the courts and whose exercise of broad and legitimate discretion the courts cannot presume either to control or to predict," it is "substantially more difficult" to establish Article III jurisdiction and the plaintiff must demonstrate "that those choices have been or will be made in such manner as to * * * permit redressability of injury." See *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 562 (1992) (quoting *ASARCO Inc.* v. *Kadish*, 490 U.S. 605, 614-615 (1989)). The court of appeals correctly concluded on the facts of this case that habeas relief was not "likely" to redress the injury claimed by petitioner.

c. There is no merit to petitioner's contention (Pet. 17-18) that he need not demonstrate any ongoing collateral consequences because he is still serving an unexpired sentence of supervised release. It is the *relief* sought by petitioner that must *likely redress* his claimed injury, and the habeas relief in this case is not likely to redress petitioner's injury by reducing his supervised-

release term. For similar reasons, petitioner is incorrect in his contention (Pet. 22) that it "should make no difference" that he has presented his claim to a habeas court rather than to the sentencing court with authority to reduce his sentence. The key point is that the available relief that petitioner requests in such courts is different, and it is the requested relief that itself must "likely" redress petitioner's asserted injury.

Petitioner claims (Pet. 20-22 & n.10) that "analogous" cases have held that a defendant's challenge on direct appeal to a sentence involving imprisonment and supervised release is not mooted by the completion of the term of imprisonment if the district court has the authority to reduce the term or conditions of supervised release. Contrary to petitioner's suggestion (Pet. 20), none of those cases held that the mere possibility of reducing a term of supervised release categorically precludes a finding of mootness. They instead require a showing of collateral consequences and illustrate that, when a sentence is itself on appeal, a favorable decision affecting one component of the sentence normally permits the sentencing court to revisit other components of the sentencing package on remand. Thus, "in the typical case, * * * an appellate court could fairly deem it *likely enough* that, if the [sentencing issue on appeal] were decided in favor of the defendant, the district court would use its discretion on remand to modify the length of a term of supervised release." *United States* v. *Blackburn*, 461 F.3d 259, 262 n.2 (2d Cir. 2006) (emphasis added), cert. denied, 550 U.S. 969 (2007); see *United States* v. *McCoy*, 313 F.3d 561, 564 (D.C. Cir. 2002) ("[T]he controlling statutes [18 U.S.C. 3583(c) and 3553(a)] explicitly make the Guidelines computation [of McCoy's term of imprisonment] relevant to McCoy's

supervised release" and that "[r]esentencing under a revised Guidelines computation clearly could benefit McCoy.").

d. Petitioner contends (Pet. 24) that dismissal of his case "permitted BOP effectively to shield" its actions from judicial review. This Court rejected a similar argument in *Spencer*. "[M]ootness, however it may have come about, simply deprives [the Court] of [its] power to act" and, here, "there is nothing for [the habeas court] to remedy, even if [it] were disposed to do so." *Spencer*, 523 U.S. at 18. Article III courts "are not in the business of pronouncing that past actions which have no demonstrable continuing effect were right or wrong." *Ibid.* As for petitioner's assertion that the court of appeals' decision leaves the Bureau "free 'to return to [its] old ways,'" Pet. 25 (citation omitted; brackets in original), the Bureau has demonstrated otherwise by rescinding Paragraph 5(a) and promulgating the challenged policy in a notice-and-comment rulemaking that began *before* petitioner filed his habeas action. See 74 Fed. Reg. 1894-1895, 1899 (2009) (final rule to be codified at 28 C.F.R. 550.55(b)(7) (2009)); 69 Fed. Reg. 39,889, 39,892 (2004) (proposed rulemaking).

2. Petitioner contends (Pet. 5-15) that review is warranted to resolve the conflict among the courts of appeals on whether a habeas petitioner's post-conviction challenge to the length of his sentence becomes moot when he has served his term of imprisonment and is on supervised release. Although the opinion of the court of appeals is in tension with decisions of the Second and Ninth Circuits, this Court's review is not warranted in this case.

a. In *Levine* v. *Apker*, 455 F.3d 71 (2006), the Second Circuit held that a challenge to the Bureau's

amended rule governing placements in community correctional centers remained live despite the habeas petitioner's discharge from prison into supervised release, because the district court "might * * * modify the length of [his] supervised release." *Id.* at 77. The court of appeals reached that conclusion in the absence of any briefing on mootness, *ibid.*, and thus without affording the government the opportunity to argue that such a result was unlikely. Cf. *Blackburn*, 461 F.3d at 262 (subsequent Second Circuit decision relying on record to reject defendant's asserted claim of collateral consequences; holding that inmate's release rendered the case moot).

In *Mujahid* v. *Daniels*, 413 F.3d 991 (9th Cir. 2005), cert. denied, 547 U.S. 1149 (2006), the petitioner filed a habeas petition to contest the BOP's interpretation of the "good time credit" provisions in 18 U.S.C. 3624(b), but was serving his term of supervised release at the time of the appeal. Concluding that its previous decision in *Gunderson* v. *Hood*, 268 F.3d 1149 (9th Cir. 2001), "controls our mootness inquiry," the Ninth Circuit held that "[t]he 'possibility' that the sentencing court would use its discretion to reduce a term of supervised release under 18 U.S.C. § 3583(e)(2) was enough to prevent the petition from being moot." *Mujahid*, 413 F.3d at 994-995 (citations omitted).

Neither *Mujahid* nor *Gunderson* properly analyzed the mootness issue in light of *Spencer*. *Mujahid* cited *Spencer* for the proposition that a plaintiff must suffer "an actual injury traceable to the defendant and *likely* to be redressed by a favorable judicial decision," 413 F.3d at 994 (quoting *Spencer*, 523 U.S. at 7) (emphasis added), but then adopted the *Gunderson* standard requiring only a "possibility" of such redress, which *Spen-*

cer rejected. See *Spencer*, 523 U.S. at 14 (rejecting reliance on asserted injury that was only a "possibility" and not "even a probability"). Not only did *Gunderson* fail to consider *Spencer*'s teachings, *Mujahid* itself did not acknowledge that *Spencer* holds that it is a habeas petitioner's burden, and not the government's, to demonstrate that collateral consequences exist. See *ibid.* ("The question remains, then, whether petitioner demonstrated such consequences."); see also, *e.g.*, *United States* v. *Hardy*, 545 F.3d 280, 284 (4th Cir. 2008); *United States* v. *Vera-Flores*, 496 F.3d 1177, 1181 (10th Cir. 2007); *United States* v. *Mercurris*, 192 F.3d 290, 294 (2d Cir. 1999).

The "possibility" standard reflected in those cases is thus incorrect. But even petitioner does not seem to claim that the mere "possibility" of a discretionary reduction is adequate to save a case from mootness. Petitioner has conceded that "[t]he Third Circuit correctly noted that *Spencer* requires that an asserted injury be 'likely to be redressed by a favorable judicial decision.'" Pet. 22 (quoting *Spencer*, 523 U.S. at 7). Petitioner thus presents the more modest claim that the court of appeals "misapplied that test." *Ibid.* As explained above, the court of appeals' assessment of the likelihood that the habeas relief sought by petitioner would ultimately reduce his term of supervised release in a separate proceeding before a separate court is correct. That fact-bound determination does not warrant this Court's review.

b. Petitioner cites (Pet. 11) *Dawson* v. *Scott*, 50 F.3d 884 (11th Cir. 1995), as inconsistent with the decision below. That case, decided before both *Johnson* and *Spencer*, stated in a footnote that a habeas petitioner's challenge to the Bureau's calculation of sentencing

credit was not moot because, although the petitioner had been released from prison, "success * * * could alter the supervised release portion of his sentence." *Id.* at 886 n.2. In its unpublished opinion in *Mitchell* v. *Middlebrooks*, 287 Fed. Appx. 772, 775 (2008), the Eleventh Circuit stated that the reasoning of *Dawson* is not inconsistent with *Johnson*, but did not address whether *Dawson*'s standard for determining collateral consequences comports with *Spencer*. In the absence of a more recent precedential decision by the Eleventh Circuit, petitioner has failed to show a division of authority with that court.

Petitioner also asserts (Pet. 12-13) that an intracircuit conflict exists in the Fifth Circuit, but any such conflict would not warrant this Court's review. *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam). And, for the same reasons that the Ninth Circuit's decision in *Mujahid* contravenes *Spencer*, the Fifth Circuit's reliance on *Mujahid* in *Johnson* v. *Pettiford*, 442 F.3d 917 (5th Cir. 2006), is equally unfounded.

c. Petitioner overstates the case in asserting (Pet. 14) that, as a result of a division of authority, "identically situated petitioners have their habeas petitions decided or dismissed purely based on the happenstance of the circuit in which the case arises." In light of the fact-specific nature of the inquiry into the existence of collateral consequences and the likelihood that requested relief will remedy such claimed injuries, it is significant that none of the cases that petitioner cites in support of a conflict addresses a challenge on procedural grounds to the Bureau's denial of early release from imprisonment or involved a former inmate who, like petitioner, previously violated the terms of his supervised release. Both circumstances make it extremely unlikely

that a former inmate would receive the benefit of a discretionary reduction in a term of supervised release from a sentencing court to offset any excess prison term that the inmate purportedly served.

3. Finally, this case presents a poor vehicle for further review. Petitioner has been released from his term of imprisonment and can only obtain a reduction in his unexpired term of supervised release by filing an appropriate motion with his Ohio sentencing court under 18 U.S.C. 3583(e). Article III jurisdiction for the Ohio district court to entertain that motion unquestionably exists because the requested relief (a reduction in a continuing supervised-release term) would redress the injury claimed by petitioner (an ongoing restriction of his liberty). The court's response to that motion, as a prudential matter, is unknown. The court might indicate that in no circumstances would it grant relief; or it (conceivably) could grant relief. Rather than litigate in this Court whether it is sufficiently "likely" that the Ohio district court might exercise its sentencing discretion favorably for petitioner if such a motion were filed, petitioner should file the motion with that court while he still has time before his three-year term of supervised release expires.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ELENA KAGAN
Solicitor General
LANNY A. BREUER
Assistant Attorney General
KIRBY A. HELLER
Attorney

SEPTEMBER 2009